

**Steak and Ale Restaurant, Sharonville and Dennis Smith and William Todd Emmons. Cases 9-CA-17108-1 and 9-CA-17108-2**

August 4, 1982

**DECISION AND ORDER**

**BY CHAIRMAN VAN DE WATER AND  
MEMBERS JENKINS AND HUNTER**

On May 7, 1982, Administrative Law Judge Frank H. Itkin issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.<sup>1</sup>

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,<sup>2</sup> and conclusions<sup>3</sup> of the Administrative Law Judge and to adopt his recommended Order as modified herein.<sup>4</sup>

**ORDER**

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Steak and Ale Restaurant, Sharonville, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Insert the following as paragraph 2(b) and re-letter the subsequent paragraphs accordingly:

<sup>1</sup> Respondent has requested oral argument. This request is hereby denied as the record, Respondent's exceptions, and the brief adequately present the issues and the positions of the parties.

<sup>2</sup> Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

<sup>3</sup> We agree with the Administrative Law Judge that Respondent violated Sec. 8(a)(1) of the Act by discharging Dennis Smith, Tamara Smith, and William Todd Emmons because they complained to Respondent about their terms and conditions of employment. *Ronald Morgan Cadillac*, 202 NLRB 1017 (1973). In so doing, we note that *N.L.R.B. v. Interboro Contractors, Inc.*, 388 F.2d 495 (2d Cir. 1967), and *ARO, Inc. v. N.L.R.B.*, 596 F.2d 713 (6th Cir. 1979), are inapposite, and we do not rely on them here.

<sup>4</sup> In accordance with our decision in *Sterling Sugars, Inc.*, 261 NLRB No. 71 (1982), the Administrative Law Judge's recommended Order is being modified to require Respondent to expunge from its files any reference to the discharges of Dennis Smith, Tamara Smith, and William Todd Emmons, on July 4, 1981, and to notify them of such, once done.

In accordance with his partial dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980), Member Jenkins would award interest on the backpay due based on the formula set forth therein.

"(b) Expunge from its files any reference to the discharges of Dennis Smith, Tamara Smith, and William Todd Emmons on July 4, 1981, and notify them in writing that this has been done and that evidence of these unlawful discharges will not be used as a basis for future personnel actions against them."

2. Substitute the attached notice for that of the Administrative Law Judge.

**APPENDIX**

**NOTICE TO EMPLOYEES  
POSTED BY ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD  
An Agency of the United States Government**

WE WILL NOT discharge, or fail and refuse to reinstate, any employee in consequence of his or her protected activity.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by the National Labor Relations Act.

WE WILL offer to Dennis Smith, Tamara Smith, and William Todd Emmons immediate and full reinstatement to their old jobs or, if those jobs no longer exist, to substantially equivalent jobs without prejudice to their seniority or other rights, and WE WILL make them whole, with interest, for any loss of pay resulting from their discharges.

WE WILL expunge from our files any references to the discharges of Dennis Smith, Tamara Smith, and William Todd Emmons on July 4, 1981, and WE WILL notify them that this has been done and that evidence of these unlawful discharges will not be used as a basis for future personnel actions against them.

**STEAK AND ALE RESTAURANT,  
SHARONVILLE**

**DECISION**

FRANK H. ITKIN, Administrative Law Judge: Unfair labor practice charges were filed in the above consolidated cases on July 9 and 10, 1981. A complaint issued on August 14, 1981. A hearing was later conducted in Cincinnati, Ohio, on March 31, 1982. Briefly, the General Counsel alleges that Respondent Company, Steak and Ale Restaurant, Sharonville, violated Section 8(a)(1) of the National Labor Relations Act by discharging employees Dennis Smith, Tamara Smith, and William Todd Emmons because they had engaged in protected concerted activities. Respondent denies that it has violated the Act as alleged. Upon the entire record, including my observation of the demeanor of the witnesses, I make the following:

## FINDINGS OF FACT

Respondent Company operates a restaurant in Sharonville, Ohio, and is admittedly an employer engaged in commerce as alleged in the complaint. The Company admittedly discharged employees Dennis Smith, Tamara Smith, and William Todd Emmons on or about July 4, 1981. The evidence pertaining to these discharges is summarized below.

Tamara Smith testified that she started working for the Company as a waitress about October 1980; that there was "a change in Management" at the Sharonville restaurant during April 1981; that Tom McKinney then became the new "franchise person" at the facility; and that, as a consequence:

[T]hey had changed a lot of rules. They had [an] insurance plan which he was offering to the people at Steak And Ale. The only ones that were able to have the insurance were the ones that already had it with the corporation, and a lot of us were due to enter into the program after six months. He was not offering that.

\* \* \* \* \*

He was not offering the 15 percent guarantee on tips. That meant that if there was eight or more people that came into the restaurant to eat, and if they did not tip you 15 percent of the total bill, . . . they [the Management] would make up the difference on that.

Tamara Smith explained that the "15 percent guarantee" had been a part of the Employer's "policy" prior to April 1981. In addition, Tamara Smith related other "changes" similarly instituted by management, as follows:

They had taken the ceiling off the tip share . . . [and] we were told we would have to bus our last few tables at night or after lunch . . . so we were paying out the tip share and we weren't getting the services that we were supposed to from the bus boys.

Tamara Smith discussed the above "changes" with a number of her coworkers, including her husband Dennis Smith. Tamara Smith recalled that:

[A]bout two weeks prior to being fired, there were some employees that were sitting [at the restaurant] after dinner on a Saturday night . . . and we had just talked about the different changes, and they all wanted Denny [her husband Dennis Smith] to go . . . and ask for a meeting and discuss things with [Management] because they were afraid of being fired.

Tamara Smith next testified that on or about Friday July 3, 1981, she went to the restaurant "to pick up" her husband Dennis. At the time, an employee was "sitting there talking about how she had worked the lunch salad bar and that she was unaware how to do it, and she was

leaving things off the salad bar, and . . . she was upset because nobody had instructed her what to do. . . ." Employee William Todd Emmons joined this "discussion" and "he [Emmons] said that he would like to have a meeting [with Management] too because of some things in the kitchen." Emmons then walked in the kitchen and returned with Assistant Manager Karen McKay.

Tamara Smith recalled the following "discussion" with McKay:

She [McKay] came in, and I [Tamara Smith] asked her if we could have a meeting, and she said, well a meeting would cost too much. It would cost \$110 and Tom McKinney didn't have that kind of money, and she kind of chuckled and laughed and she said . . . a meeting wasn't necessary . . . there weren't any problems and she really wasn't that concerned about it . . . .

Later that day, however, McKay joined Tamara Smith and a number of other employees while "eating lunch." The employees, in the presence of McKay, "talked about the insurance"; "the 15 percent gratuity"; "the tip share ceiling"; "we were not getting the full service out of our bus boys"; "how they had cut the wages of one person"; and "there was a lack of communication with Management." Tamara Smith noted that both she and her husband Dennis actively participated in this "discussion" with McKay.<sup>1</sup> Furthermore, Tamara Smith recalled that Assistant Manager Ed Edwards also joined this "meeting." Edwards "walked in" and "he was in there for most of the conversation." At one point during this "discussion," according to Tamara Smith, Dennis Smith "told Ed that he was Steak and Ale's little slave, and that he was being told to do a lot of things . . . ."

Tamara Smith, as she further testified, received a telephone call on the following day, July 4, from McKay. Tamara Smith recalled that McKay "wanted to talk to us"—Dennis and Tamara. Tamara and Dennis later went to the restaurant. There, the two employees met with Manager Deborah Shanderski and Assistant Manager McKay. Tamara Smith testified as follows:

Q. Now, who was there in "A" Room when you had this meeting?

A. Debbie Shanderski, Karen McKay, Denny Smith, and myself.

Q. Okay, will you tell us, the best you can recall, what was said and by whom in this meeting?

A. Debbie and Denny did most of the talking.

Q. Tell us, the best you can recall what they said?

A. And, they were talking about the—

Q. Would you tell how it started?

A. Not exactly how it started no. They had talked—she [Shanderski] had talked about—asked Denny, you know, if he knew why he was here, and he said because of what happened yesterday,

<sup>1</sup> Tamara Smith acknowledged that employee Emmons did not "add anything to the discussion while Karen McKay was in the room," however, it was Emmons who had "brought McKay in."

and she said yeah. And, she goes, why don't we discuss what went on yesterday. So, we discussed about the 15 percent added gratuity, about the lack of communication with managers. We talked about hours and how they had been cut, the bussing, the tip share. We went through it all, and she didn't direct anything to me, except about the 15 percent gratuity being added on eight tips or more, and she said that some of us did a good job, and it was up to them to determine whether or not we—you know did our job or not. That if we did our job, that we would be getting a tip of 15 percent from our customers, and if we did not, then we would not be getting tipped 15 percent, and that they would determine whether we did our job or not, and it was up to them, and the individual of whether we got it or not.

Q. Do you recall anything else that was said during this meeting?

A. Then she talked to Denny, and he said, well what is the real reason why you called us in. . . . He wanted to know what the real reason was that we had been called in, and she said that our attitude had been lacking, that we were not Steak And Ale material anymore, that we were the corporation material, and that she no longer needed us.

And, he said, does that mean that we are fired, and she said, well I will give you a good recommendation. And, then he turned and directed his question—then he directed his question to Karen McKay, and asked Karen if she could do a better job, and Karen did not say anything, and then he said that Debbie needed to learn more about human feelings and how to manage her personality, because she was not doing a good job.

And, then, by the time—when he was saying that, I was getting up out of my chair and we were proceeding to leave, and when I walked into the kitchen, I said bye to Todd, and I took my hand and went across my throat, meaning that we were fired, and at that time Denny said, well Debbie we can still be friends. And, about that time, we were all standing in the kitchen, and proceeded to the back door. She unlocked the back door, and we walked out the back door.<sup>2</sup>

Dennis Smith testified that he was hired by the Company as a waiter during February 1980; that there was "a change in Management" during early April 1981; and that "on several occasions there were complaints by employees—complaints by myself to some of the managers on how we would walk in one evening and find something had been changed." Dennis Smith cited, as examples, changes in the "health insurance"; "tip sharing"; a

"guaranteed . . . bonus"; and related matters. He discussed "these problems" with his coworkers and recalled one such discussion at the restaurant about 2 weeks before his discharge. He was then asked by his coworkers to "talk" to management about the employees' "problems."

Dennis Smith, as he further testified, spoke with Assistant Manager Ed Edwards "on several occasions" about the employees' complaints and "problems." Dennis Smith cited changes in "health insurance"; "level of tips"; and related complaints. Edwards, in response, "said that he couldn't do anything . . . ; [Smith] would have to talk to other managers about it." Later, on or about July 3, 1981, Dennis Smith and his co-employees discussed their "problems" in the restaurant with both assistant managers, McKay and Edwards. Dennis Smith testified as follows:

Q. Was there any discussion with the managers in "A" Room when you went in there?

A. Yes. Before the managers came in, everybody was griping about it wasn't any fun to work there anymore, and how things had changed. Their job duties had changed and it had never been explained to them about their job duties being changed.

It was like on a daily basis, don't you know that you have to do this now. And, they would say no. And, they said, well so and so should have told you, or Ed should have told you, and one salad girl was complaining about how she was working evenings now, but—and she thought she would just do her job the same as she did it in the day, and it was different.

Myself, I was talking about health insurance, and . . . bonusing, on 15 percent on eight tips, and the increase in tip share, and then Todd [Emmons] left the room, and he said that he was going to go talk to Karen [McKay] about a meeting.

He then brought Karen [McKay] in the room, and Ed Edwards was there then, and we were talking about having a meeting. Karen left the room again, and she came back, and she said that it would cost Steak and Ale \$110 to have an employee meeting, and they can't afford to be paying out \$110 everytime their employees want to have a meeting.

And, I can't remember what Tammy said there, or Todd, but I know we were all agreeing that we would organize the meeting without pay, and it could be at one of our houses, or it could be on Steak and Ale property, it made no difference. But, we just wanted to iron out all these problems.

Q. Well, you have described some discussion of what the problems were, and that discussion took place in "A" Room?

A. Right.

Q. Was that discussion while the managers that you mentioned were present?

A. Yes, this discussion went on for approximately an hour or an hour and a half. We rehashed all the problems on how the job duties had changed, how bonusing on—on how some people were getting

<sup>2</sup> On cross-examination, Tamara Smith further explained that her husband Dennis had stated to Ed Edwards during their meeting on July 3: ". . . Ed, I don't believe you are working here. All you are is Steak And Ale's little nigger . . . ." Tamara Smith insisted that Dennis "didn't say it loud . . . ." And, she noted that Ed Edwards is not black; that the Employer had no black employees working at that time; that customers "could not have heard" this comment; that Dennis and Ed Edwards are "friends"; and that Edwards later explained to her and Dennis that the above comment did not have anything to do with the firing—. . . Ed said no, . . . he had nothing to do with it . . . ."

bonused on eight tips—the 15 percent, and like I was denied it.

We talked about the—there wasn't any—how would you say it—there wasn't any policy as far as one manager would tell us that we had to do—it was more so Ed Edwards than anyone.

\* \* \* \* \*

Q. Was there some discussion with Ed Edwards at a time when Karen McKay had left the room?

A. Yes, when Karen said that she would not have any part of a meeting, and she would not try to get us a meeting, that it costed too much, and I mentioned to Ed—I said Ed, it looks like you could emphasize [sic] with us a little bit. You are in the same position we are, and whether you know it or not—I said that they treat you like you are the gopher. They give you all the dirty work.

When there is something to be done that no one else will do, they give it to you. I said, it's like you are a nigger slave, and this is the 1800's. I said that's how they treat you.

And, I can't remember if Ed gave me any remark. I know during most of the conversation Ed just agreed, and he nodded his head, and I can't remember if he said anything back to me. I don't think he did.

Dennis Smith next recalled that he and his wife Tamara were discharged on the following day, July 4. Dennis Smith testified, as follows:

Q. And, did you return to the restaurant the 4th of July?

A. Yes, I did.

Q. For what reason?

A. At about 11:00 in the morning, Karen McKay, who is the assistant manager at Steak and Ale, she telephoned us, and Tammy said it's Steak and Ale, they want you and I to be there in a half an hour. And, I said, we were out late last night, and I said, tell them we can make it within an hour.

Q. Did you go to the restaurant?

A. We went to the restaurant. We arrived there at about 12:00, and Debbie—

Q. And, who did you talk to?

A. There was Debbie Shanderski and Karen McKay. And, they called us in the "A" Room, the same room that we had the meeting the day before, and I said—as we were sitting down, I said, we are here about the meeting that went on yesterday.

And, she said that's right, and as we sat down,—or when we were first seated, we started going over the problems again. I told her that many of the employees wanted health insurance. I wanted health insurance, Tammy wanted health insurance, and that they wanted the meeting. They wanted the meeting about being bonused on eight tips. Why some people were, some people weren't.

There was a general apprehensiveness in the air, of all the employees—not the new employees—the senior employees. I am talking about people that

had been there for six months to two years, or whatever. They were familiar with how things had been run, like I had, and they were apprehensive. They were afraid to talk to anyone.

Q. Well, what was said after you discussed these same problems that had been discussed the day before?

A. Debbie mentioned to me that she was not going to have us influencing her new people. She said that—and Karen McKay would interject. Karen McKay didn't say a whole lot during the meeting. She would interject and say that I'm making all these problems up, that there are no problems.

Q. And, what did you respond to that?

A. And, I said there had been a lot of changes, and I said it's not like it was when the corporation owned the Company, and that there had been a lot of changes and people were aware of them, and there have been a lot of people fired, and people think—your senior employees, or your senior waiter staff, and waitresses, they feel that they are going to be the next ones to be fired, and they said—Debbie then said, that we—she didn't want us influencing her new staff.

She kept saying this, and I said well—this went for about a half an hour or 45 minutes, and I said that well, did you call us in today to debate these issues again, or are we going to have a meeting or what.

She said there was not going to be a meeting, and she wasn't going to call a meeting just for us. I said that why did she call us in, and she said that she would give us a good recommendation.

I said does this mean that we are fired Debbie, and she said yes. And, I said, you have a lot to learn. I said, you may know how to run a business, but you have a lot to learn about human feelings, especially when you fire somebody 19 years old . . . .<sup>3</sup>

William Todd Emmons' testimony corroborates in essential part the testimony of both Dennis and Tamara Smith, as detailed above. Emmons started working for the Company during April 1980; changes in working conditions were made by management about April 1981; and he discussed "these changes with other employees." Specifically, Emmons discussed "these problems" on July 3, 1981. Emmons recalled, *inter alia*, that he had asked Assistant Manager McKay on July 3 "to come in the room, that we needed to talk to her about problems." In addition, Emmons recalled that Dennis Smith, during this "discussion" on July 3, stated to Ed Edwards:

I really feel sorry for you. Whenever Tom McKinney snaps his fingers, you have to run and do his

<sup>3</sup> Dennis Smith recalled that he and his wife Tamara later spoke with Assistant Manager Edwards. Edwards then assured Dennis Smith that Dennis' statement to Edwards on the prior day "had nothing to do with it." In addition, Dennis Smith noted that he did not "think [that his earlier statement to Edwards] could have been heard in any other place" in the restaurant.

dirty work. You are just his little nigger. It's a shame you can't do something without confronting [sic] him first.

\* \* \* \* \*

[Edwards] said to Denny that that was Denny's opinion, and he was sorry he felt that way.

On the following day, July 4, Emmons was called into Manager Shanderski's office and was fired. Shanderski faulted Emmons because, *inter alia*, his "heart was not in [his] work . . . ."

Manager Deborah Shanderski testified that Todd Emmons was employed as a "service assistant" and "he was probably the best one that the store ever had"; that Emmons developed during May or June 1981 "an attitude problem"; that, in addition, he once wore the T-shirt of a competitor to the restaurant when he visited the facility; that during mid-June she "talked to him" about his "attitude"; and that "we made [the] decision" to terminate Emmons "roughly . . . a week and a half before we did terminate him. . . ." Shanderski claimed, "we had to keep" Emmons after deciding to fire him because "we had an employee that was out because of illness. . . ." Shanderski assertedly told Emmons on July 4 "that he was a good employee and we wanted to keep him, but his attitude just did not change and therefore I had no other alternative but to terminate him. . . ."

Manager Shanderski next claimed that Tamara Smith "was not a very good waitress"—". . . at no time was she ever very good . . . ."; that Tamara Smith was "kept on" only because Dennis Smith was "an excellent waiter"; that she was told about Dennis Smith's statement to Edwards on July 3 and confirmed this by talking to Edwards later that same day; that she then conferred with McKinney and "we both agreed that we could not tolerate that type of language during business hours" and "disrespect towards Management"; and that "we really had no alternative but to terminate Denny" and, in addition, his wife, Tamara. According to Shanderski, she faulted Dennis and Tammy Smith on July 4 for the "type of language" used the day earlier by Dennis Smith and fired both of them. She also fired Emmons, later that same day "when he was finished." Shanderski claimed that she was unaware that, on July 3, "a whole bunch of employees" had presented "complaints to Management." Shanderski asserted: ". . . I wasn't aware of Todd and Tammy, who all was in that room, until all this stuff started coming out."

Ed Edwards testified, *inter alia*, that the "tone" of the employees' conversation with Assistant Manager McKay during the meeting of July 3 was "pretty vocal and intimidating"; and that Dennis Smith, during this meeting, "stood up and pointed" at him, stating: "you nigger lackey slave. You are just a puppet to the restaurant here, and you do their bidding at their will."

Edwards acknowledged that he did not admonish Dennis Smith for this statement or say anything further to him about the matter. In addition, Edwards acknowledged that he did not recommend to his superiors that

any disciplinary action be taken against Dennis Smith for this statement.<sup>4</sup>

I credit the testimony of Dennis Smith, Tamara Smith, and William Todd Emmons as detailed *supra*. They impressed me as trustworthy and credible witnesses. Their testimony is in significant part mutually corroborative. However, on the other hand, I do not credit the testimony of Deborah Shanderski and Ed Edwards. Their testimony was, at times, incomplete, vague, and unclear. In particular, I do not credit Shanderski's asserted reasons for the summary firing of Dennis and Tamara Smith and William Todd Emmons. I find that these essentially unsubstantiated, belated, and shifting reasons are plainly pretextual. In particular, on this record, I do not credit Shanderski's assertion that she fired Dennis Smith and his wife Tamara because Dennis Smith made a vulgar and improper remark to Ed Edwards. Indeed, Dennis Smith and Edwards were friends; Edwards did not recommend any disciplinary action for this isolated comment; and no customers overheard the comment. Nor do I credit Shanderski's belated assertions that Dennis Smith's wife Tamara was never "very good" but nevertheless was "kept on," or that management in fact had decided to fire William Todd Emmons over 1 week before his firing. Instead, as discussed below, I find here that the Smiths and Emmons were summarily fired on July 4 because on July 3 they were the key protagonists in an effort by the employees to relate to management employee complaints about their terms and conditions of employment.

#### Discussion

Section 7 of the National Labor Relations Act provides that employees "shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ." Section 8(a)(1) of the Act makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7." The presentation of employee grievances comes within the protection of Section 7 of the Act. As the Sixth Circuit stated in *N.L.R.B. v. The Halsey W. Taylor Company*, 342 F.2d 406, 408 (6th Cir. 1965):

We are not concerned in this case with the merit or lack of merit of [the employee's] grievance. But it is clear that Sec. 7 protects his right to utter it as a matter of concerted activity with other employees for mutual aid.

Also see *N.L.R.B. v. Interboro Contractors, Inc.*, 388 F.2d 495 (2d Cir. 1967); *ARO, Inc. v. N.L.R.B.*, 596 F.2d 713 (6th Cir. 1979); and *N.L.R.B. v. Guernsey-Muskingum*

<sup>4</sup> Edwards said that Manager Shanderski telephoned him later that evening, on July 3: "She called me up and asked me did Dennis Smith say this to me, and I said yes. She said, that's grounds for firing, and I agreed with it."

*Electric Cooperative, Inc.*, 285 F.2d 8 (6th Cir. 1960); and cases cited.

The credible evidence of record here, as recited *supra*, makes it quite clear that Respondent Company's employees had discussed among themselves their complaints pertaining to management's changes in their terms and conditions of employment and that, on July 3, employees Dennis and Tamara Smith and employee William Todd Emmons were attempting to present these complaints to management. The credible evidence of record also makes it quite clear that employees Dennis and Tamara Smith and employee Emmons had assumed the role of key protagonists in this effort to present their fellow employees' complaints to management. On the following day, July 4, employees Dennis and Tamara Smith and employee Emmons were summarily fired. I find here that management summarily fired these three employees because they were attempting to present the complaints of their fellow employees pertaining to their terms and conditions of employment, in violation of Section 8(a)(1) of the Act.

Respondent asserts that it had decided to fire employee Emmons over a week earlier because of, *inter alia*, a negative turn in his attitude. Previously, Emmons, like Dennis Smith, had been regarded by Respondent as a good employee. Respondent argues that employee Tamara Smith was, in effect, never a very good employee, but she was kept on while her husband, Dennis, worked there. Respondent further argues that it fired Dennis Smith because of his racial comment to Ed Edwards. I reject these essentially unsubstantiated, shifting, and belated assertions as excuses offered in an attempt to justify the firing of these three employees for engaging in protected concerted activities. I note that Ed Edwards did not admonish or reprimand employee Dennis Smith for his racial comment. Edwards did not recommend disciplinary action against Smith. No customers heard this isolated comment. And, of course, employees Tamara Smith and Emmons, summarily fired the same day, did not make this racial comment to Edwards. Indeed, Edwards later acknowledged to employee Dennis Smith, a friend, that, in effect, he was not fired for this reason.

In sum, I find that the reason for the July 4 firing of these three employees was to stop their protected concerted activities.

#### CONCLUSIONS OF LAW

1. Respondent is engaged in commerce within the meaning of the Act.
2. Respondent has violated Section 8(a)(1) of the Act by discharging employees Dennis Smith, Tamara Smith, and William Todd Emmons on or about July 4, 1981, and by thereafter failing and refusing to reinstate them.
3. Such unfair labor practices affect commerce within the meaning of the Act.

#### THE REMEDY

Having found that Respondent has violated the Act by unlawfully discharging employees Dennis Smith, Tamara Smith, and William Todd Emmons, and thereafter failing and refusing to reinstate them, I shall recommend that Respondent be required to cease and desist therefrom

and from in any like or related manner infringing on employee rights. In addition, I shall recommend that Respondent be required to take certain affirmative action which will effectuate the policies of the Act. I shall recommend that Respondent be required to offer employees Dennis Smith, Tamara Smith, and William Todd Emmons immediate reinstatement to their old jobs or, in the event such jobs no longer exist, to substantially equivalent jobs, and make them whole for any loss of pay they may have suffered by reason of their discharges, by payment to them of a sum of money equal to that which they would have earned but for their discharges, from July 4, 1981, to the date of offers of reinstatement, less their net earnings during this period, to be computed in the amount described in *F. W. Woolworth Company*, 90 NLRB 289 (1950), with interest to be computed as set forth in *Florida Steel Corporation*, 231 NLRB 651 (1977).<sup>5</sup> Respondent will also be directed to post the attached notice.

#### ORDER<sup>6</sup>

The Respondent, Steak and Ale Restaurant, Sharonville, Ohio, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discharging employees, or failing or refusing to reinstate them, in consequence of their participation in concerted activity for the purpose of mutual aid and protection.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Offer employees Dennis Smith, Tamara Smith, and William Todd Emmons immediate and full reinstatement to their old jobs or, in the event such jobs no longer exist, to substantially equivalent jobs, and make them whole for any loss of pay they may have suffered by reason of Respondent's action in discharging and failing and refusing to reinstate them, in the manner set forth in the section of this Decision entitled "The Remedy."

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at its Sharonville, Ohio, facility copies of the attached notice marked "Appendix."<sup>7</sup> Copies of said

<sup>5</sup> See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

<sup>6</sup> In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

<sup>7</sup> In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

notice, on forms provided by the Regional Director for Region 9, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to

ensure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 9, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.<sup>8</sup>

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<sup>8</sup> The General Counsel's motion to correct the transcript, which is unopposed, is granted.